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No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., AND PHILIP MORRIS INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

CASES

Airmark Corp. v. FAA,
758 F.2d 685 (D.C. Cir. 1985) 7

FTC v. Brown & Williamson Tobacco Corp.,
778 F.2d 35 (D.C. Cir. 1985) 5

Flanagan v. Altria Group, Inc.,
No. 05-71697, 2005 WL 2769010
(E.D. Mich. Oct. 25, 2005) 2

Ford Motor Co. v. FTC,
547 F.2d 954 (6th Cir. 1976) 6

Good v. Altria Group, Inc.,
436 F. Supp. 2d 132 (D. Me. 2006) 2

Price v. Philip Morris, Inc.,
848 N.E.2d 1 (Ill. 2005) 2, 6

Sullivan v. Philip Morris USA Inc.,
No. 03-796, 2005 WL 2123702
(W.D. La. Aug. 31, 2005) 2

United States v. Philip Morris USA Inc.,
449 F. Supp. 2d 1 (D.D.C. 2006),
appeal docketed No. 06-5267
(D.C. Cir. Sept. 11, 2006) 1, 2

Watson v. Philip Morris, Cos.,
No. 4:03-CV-519, 2003 WL 23272484
(E.D. Ark. Dec. 12, 2003) 5

MISCELLANEOUS

42 Fed. Reg. 21,155 (Apr. 11, 1977) 5

36 Fed. Reg. 18,515 (Sept. 16, 1971) 6

59 Fed. Reg. 51,980 (Oct. 13, 1994) 6

16 C.F.R. § 1.1 5

16 C.F.R. § 1.3 5

16 C.F.R. § 2.34 6

ARGUMENT

Respondent submits this supplemental brief pursuant to Supreme Court Rule 15 in response to the submission filed by the Solicitor General. *See* Brief For The United States As Amicus Curiae ("SG Br.") (Dec. 15, 2006). Respondent agrees with the Solicitor General's assessment that this case "does not merit this Court's review." *Id.* at 1. In particular, respondent agrees with the Solicitor General that the supposed "conflict" relied upon by petitioners in support of review does not exist, and that the issue is sufficiently "fact-specific" that review would be inappropriate. *Id.* at 12-15.

Respondent writes to address certain statements made by the Solicitor General concerning the Federal Trade Commission's ("FTC") regulatory history with respect to tar and nicotine measurements, disclosures, and marketing that go beyond, and are contradicted by, the factual record in this case. As an initial matter, we note that the Department of Justice is hardly a disinterested party in this matter. The Department of Justice is currently involved in litigation against respondent, in which one of the central issues is the FTC's regulatory history with respect to low yield cigarettes. *See United States v. Philip Morris USA Inc.*, No. 99-2496, 449 F. Supp. 2d 1, 2006 WL 2380650, at *222 (D.D.C. 2006) (enjoining use of lights descriptors), *appeal docketed* No. 06-5267 (D.C. Cir. Sept. 11, 2006) (stay granted pending appeal).

In any event, the Solicitor General has made a number of statements regarding the FTC's regulatory history that should be corrected. Those statements, as set forth below, are contradicted by the FTC's own statements and documents found in this record and the decisions of other courts considering the FTC's comprehensive low tar regulatory

program.[1] These corrections further demonstrate that the Eighth Circuit -- after conducting a careful examination of the FTC's regulatory history -- did not err in its factual determinations or in its legal conclusion that federal officer removal was proper. For example:

1. *Definition of low tar.* The Solicitor General argues that the FTC has never defined the term "low tar." SG Br. at 4. The record in this case is to the contrary. The FTC repeatedly has "formally" defined "low tar" in terms of the FTC Method. *See* DA-582 ("[t]he FTC formally defines a low 'tar' cigarette as one that has 15.0 or less milligrams of 'tar'" according to the FTC Method); *see also* DA-0538 (1979 FTC Report to Congress); DA-0542 (1980 FTC Report to Congress); *Price*, 848 N.E.2d at 14, 50 (recognizing that the FTC defined "low tar" in reference to the FTC Method). Indeed, the FTC annually has reported to Congress every year on the market share of "low yield cigarettes" -- *i.e.*, "those having 15 mg. of 'tar' or less." *See, e.g.*, DA-538 (1979 FTC Report to Congress).

The Solicitor General addresses only one of these documents: the 1979 FTC Report to Congress. *See* DA-538. The Solicitor General asserts that, in this report, the FTC "assured Congress that it had never formally defined 'ultra-

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[1] *See, e.g., Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 49 (Ill. 2005) (the FTC "specifically authorized" use of the "lights" descriptor); *Flanagan v. Altria Group, Inc.*, No. 05-71697, 2005 WL 2769010, at *2, 7 (E.D. Mich. Oct. 25, 2005) (use of descriptors was "specifically authorized" by the FTC); *Sullivan v. Philip Morris USA Inc.*, No. 03-796, 2005 WL 2123702, at *9 (W.D. La. Aug. 31, 2005) (respondent "complied with § 5(a)(1)" of the FTC Act when using descriptors), *appeal granted on other grounds*, Nos. 06-1, 06-30311 (5th Cir. Mar. 27, 2006); *Good v. Altria Group, Inc.*, 436 F. Supp. 2d 132, 138 (D. Me. 2006) (the FTC has determined that "descriptors are not forbidden and are not unfair or deceptive (at least if not unsubstantiated)"); *but see United States*, 2006 WL 2380650, at *222 n.88 (rejecting preemption argument).

low tar', or any term related to 'tar' level." SG Br. at 4; *see also id.* at 11. In fact, in that report, the FTC actually told Congress that: "the FTC has not defined 'ultra-low tar,' or any term related to 'tar' level ***except for 'low tar,' which the FTC defines as 15.0 mg or less tar.***" DA-538 n.11 (emphasis added). Thus, as illustrated by the very report cited by the Solicitor General, the FTC specifically authorized the descriptor "low tar" by defining it in terms of the FTC Method that it developed and directed Philip Morris USA (PM USA) to use.

2. *FTC Regulatory Activities.* The Solicitor General states that the FTC exercises its regulatory authority "in two ways": by "bring[ing] an administrative or judicial enforcement action," and by "promulgat[ing] trade regulation rules." SG Br. at 3. The Solicitor General's assertion is contradicted by the evidence and testimony in the record that the FTC establishes regulatory policies in a number of other ways as well. For example, Lee Peeler, a spokesman chosen by the FTC to speak for the agency,[2] testified that the FTC frequently uses "voluntary agreements" to provide guidance and direction as to the FTC's policies with regard to deceptive advertising. DA-692. Mr. Peeler also explained that the FTC relies upon enforcement actions brought against a single company to provide guidance and direction to the entire industry as to what conduct the FTC does and does not permit. *See* DA-702; PA-94. In addition, Mr. Peeler noted that the FTC uses Advisory Opinions to provide industry guidance. DA-703. Furthermore, as Daniel Oliver, then-Chairman of the FTC, explained to a Congressional subcommittee, the FTC has found these informal means of

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[2] At the time of his testimony, Mr. Peeler was the Deputy Director of the FTC's Bureau of Consumer Protection and had been employed at the FTC for over 30 years. DA-673-74. The deposition cited herein was a Federal Rule of Civil Procedure 30(b)(6) deposition in which Mr. Peeler was designated by the FTC to speak on its behalf. *See* DA-673-674.

regulation to be more efficient than traditional rulemaking, especially with respect to the tobacco industry. DA-341; *see also* DA-338-340; DA-446-449; DA-432-433.

3. *1970 Agreement.* The Solicitor General also errs in characterizing the 1970 agreement -- in which PM USA agreed to disclose FTC-measured tar and nicotine yields in all cigarette advertising -- as a "private agreement" not involving the FTC. SG Br. at 4. This error, in turn, leads the Solicitor General to conclude that the FTC never required PM USA "to report the results of [FTC] tests in its advertising." *Id.* at 9. To the contrary, the FTC urged the tobacco industry to reach an agreement requiring tar and nicotine yield disclosures in lieu of formal rulemaking that the FTC had proposed. *See* DA-525-26. The FTC *rejected* the first agreement proposed by the tobacco industry, requiring a number of changes. *See* DA-456-63; DA-464. The FTC voted to accept the agreement and withdrew its proposed rulemaking only after the industry changed the agreement to the FTC's exact requirements. *See* DA-521-22.[3] When accepting the agreement, the FTC warned that it would initiate rulemaking once again if the agreement was not effective in compelling tar and nicotine yield disclosures. *See* DA-451-52. Thus, although the FTC did not require the disclosure of FTC Method results by a formal rule, the FTC's actions in this regard clearly amount to informal regulation of tar and nicotine disclosures, as the Eighth Circuit correctly held.

4. *The FTC's Mandated Measurement Method.* The Solicitor General mistakenly contends that the FTC never mandated the use of the FTC Method for measuring tar and nicotine yields. SG Br. at 9. To the contrary, the FTC repeatedly explained that the *only* tar and nicotine statements that could appear in advertising were "factual statement[s] of the tar and nicotine content (expressed in milligrams)" based

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[3] Prior to voting, the FTC placed the proposal on the public record for comment, and received comments. DA-451-52.

on "tests conducted in accordance with the [FTC] Method." DA-037; *see also* DA-295 ("[U]se of more than one testing method . . . would only serve to confuse or mislead the public."); DA-299 ("statements or representations" of tar yields "based on non-standardized tests having no official or governmental sanction would tend to confuse and mislead the public"). In fact, the FTC even declared in an Advisory Opinion -- which is binding on the FTC, 16 C.F.R. §§ 1.1, 1.3 -- that it "would be deceptive to advertise a tar figure which is higher than the latest applicable FTC tar figure." DA-527-529; *see also* 42 Fed. Reg. 21,155 (Apr. 11, 1977) (rejecting request to test cigarettes using different parameters than the FTC Method).

In the face of these repeated statements by the FTC, the Solicitor General mistakenly relies on a passage in *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985), contending that it shows that the FTC could not mandate its test without a formal Trade Regulation Rule. SG Br. at 10. In the cited passage, however, the D.C. Circuit merely concluded that because the FTC had acted through means other than a Trade Regulation Rule in establishing the FTC Method, in any litigation brought to enforce its directives with respect to the test method the FTC would have to proceed via a Section 5 action (rather than suing directly for a violation of a Trade Regulation Rule) and retained the burden of proof regarding deception or unfairness in any such proceeding. 778 F.2d at 44-45; *see also Watson v. Philip Morris, Inc.*, No. 4:03-CV-519, 2003 WL 23272484, at *19 (E.D. Ark. Dec. 12, 2003).

5. *Delegation Of Testing.* The Solicitor General states that "[a]fter the FTC ceased conducting the tests in 1987, the TITL [Tobacco Institute Testing Lab] continued to conduct them." SG Br. at 4. The TITL did not merely decide to continue with the FTC's tests on its own. Instead, the FTC expressly delegated the testing function to the TITL. In fact,

the FTC uses compulsory process to require the tobacco companies to submit the TITL's measurements to the FTC in sworn statements under penalty of perjury, and retains the right to conduct unlimited inspections of the TITL's measurement labs. *See* DA-690 (the FTC obtained FTC Method results by "compulsory process"; the "[FTC] would send 6B requests which were orders to . . . the cigarette manufacturers and they would provide us with the results of the . . . testing"; "the responses to 6Bs are sworn"); DA-320 (compulsory process used to obtain test results according to "the Commission's approved methodology"); DA-291-92 (FTC uses compulsory process to obtain FTC Method results from manufacturers); DA-322-46.

6. *1971 American Brands Consent Decree.* The Solicitor General states that a consent decree "binds only the parties to that decree." SG Br. at 11. Yet the evidence in the record establishes that the FTC uses consent decrees to establish its regulatory policies for an entire industry -- *i.e.*, in what circumstances will the FTC bring a Section 5 action to address conduct that it deems deceptive. *See, e.g.*, DA-341 (FTC Chairman testifying that "[i]n the case of the cigarette industry . . . it is entirely reasonable to suppose that one action against one cigarette company would have an effect on all of them, and that you would not have to make a rule."); *see also Price*, 848 N.E.2d at 53-54 ("[A] consent order entered into by the FTC with one member of a regulated industry, which is published pursuant to statute, provides implied authority for other members of the regulated industry to engage in the same conduct."). For this reason, the FTC publishes all proposed consent decrees (as it did for this one) first for notice and comment. *See, e.g.*, 36 Fed. Reg. 18,515 (Sept. 16, 1971); 59 Fed. Reg. 51,980 (Oct. 13, 1994); 16 C.F.R. § 2.34. And the FTC is generally prohibited from treating identically situated parties differently in consent decrees. *See, e.g., Ford Motor Co. v. FTC*, 547 F.2d 954, 959-61 (6th Cir. 1976) (the FTC must afford the same

treatment to one competitor that it has allowed to another competitor in an earlier consent decree); *Airmark Corp. v. FAA*, 758 F.2d 685, 692, 695 (D.C. Cir. 1985) (vacating agency's orders because the agency's treatment of different entities was "grossly inconsistent and patently arbitrary").

7. *FTC's Encouragement Of Descriptors.* The Solicitor General states that the FTC never "requested nor required" the use of descriptors. SG Br. at 9. Although it is true that the FTC never "required" the use of descriptors, the FTC clearly articulated a policy to encourage manufacturers to compete on the basis of reductions in FTC-measured tar and nicotine yields. *See, e.g.*, DA-033 (FTC wanted to "augment information available to the public on the tar and nicotine content of cigarettes"); DA-299 (stating that the FTC's "current enforcement policy in regard to statements of, and representations relating to, tar and nicotine content of cigarettes" was to "not challenge such statements or representations where they are shown to be accurate and fully substantiated by" the FTC Method).

8. *PM USA Petition To The FTC.* The Solicitor General presents an incomplete description of PM USA's 2002 petition to the FTC -- which was not in the record below. SG Br. at 5. In that petition, PM USA acknowledged that the FTC currently "require[s] the use of the [FTC] Method" for measuring tar and nicotine yields and "allow[s] the use of descriptors." Petition at 6, 13. PM USA merely asked the FTC to consider whether it should change its regulatory regime in light of new scientific developments. Petition at 5.

Once these factual errors are corrected, the Solicitor General's assertion that the FTC never "exercised comprehensive control" with respect to tar and nicotine measurements, disclosures, and marketing is palpably incorrect. SG Br. at 7. As the Eighth Circuit properly recognized, the FTC controlled how tar and nicotine yields should be measured and what manufacturers could say about

those measurements. In fact, as discussed above, the FTC even specifically delegated testing responsibilities to the tobacco industry, thereby satisfying even the standard for federal officer removal proposed by the Solicitor General. *See supra* at 5-6.

CONCLUSION

For these reasons, as well as the reasons set forth in respondent's opposition, this Court should deny review.

Respectfully submitted,

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